

6-1-1986

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Recommended Citation

Kathleen M. McKenna, *The Peculiar Risk Doctrine: High Rise Benefits for California Construction Workers*, 19 Loy. L.A. L. Rev. 1495 (1986).

Available at: <https://digitalcommons.lmu.edu/llr/vol19/iss4/14>

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THE PECULIAR RISK DOCTRINE: HIGH RISE BENEFITS FOR CALIFORNIA CONSTRUCTION WORKERS

I. INTRODUCTION

When a California construction worker falls from a scaffold, or heavy equipment crushes him or the trench he is digging collapses on him, an avenue of recovery closed to most other employees opens to him: a "third party" suit under the "peculiar risk" doctrine.

Employees injured on the job generally are limited to workers' compensation awards for injuries incurred during the scope of employment.¹ The workers' compensation system developed as a trade-off of employer and employee rights under the common law of torts. Employers accepted no fault liability and gave up various defenses that would bar tort recovery by their employees. In return, employees gave up on the right to litigate the issue of employer fault, with potentially greater verdicts, for the smaller but certain workers' compensation benefits, including provision of immediate medical care and regulation of workplace safety.² Only a few statutory exceptions to California workers' compensation laws permit an employee to directly sue his employer.³

1. CAL. LAB. CODE § 3600 (West 1971) provides that workers' compensation is the exclusive remedy against employers for injuries sustained by their employees arising out of and in the course of employment.

2. The nation's first workers' compensation system was established in New York in 1910. Although initially overturned as an invalid exercise of the state's police powers in *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), the statute was upheld by the United States Supreme Court in *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1916), following an amendment to New York's constitution.

California's workers' compensation system was enacted in 1937 by constitutional amendment. CAL. CONST. art. XIV, § 4 now provides that:

A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation

3. Limited exceptions exist where an employer is uninsured, CAL. LAB. CODE § 3706 (West 1971 & Supp. 1985) (civil suit permitted); where an employer willfully assaults an employee, CAL. LAB. CODE § 3602(b)(1) (West 1971 & Supp. 1986) (civil suit permitted); where an employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection to the job, CAL. LAB. CODE § 3602(b)(2) (West 1971 & Supp.

In the construction industry, in particular, a worker's ability to sue a third party for injuries incurred on the job greatly multiplies potential recovery for on-the-job injuries.⁴ A construction worker is often employed by a subcontractor of the general contractor, who in turn works under a contract with the landowner who is developing the construction project. Although the worker may be unable to sue the subcontractor who hired him, there are several potential "third party" defendants in a lawsuit: other subcontractors, the general contractor and the landowner.⁵ Furthermore, a number of common law theories of liability exist against landowners and general contractors. Landowners have common law duties to invitees on their land,⁶ including workers. The common law also imposes duties on landowners in the selection,⁷ direction⁸ and supervision of contractors.⁹ Both landowners and general contractors can be held liable where they retain control over work at a construction site.¹⁰ These common law rules are often sufficient to permit an injured construction worker to recover in tort against third parties.

Another duty adds significantly to the possible bases of tort liability of landowners and general contractors: the *Restatement of Torts* "pecu-

1986) (civil suit permitted for aggravation of disease only); where an employee's injury or death results from a product manufactured by his employer, but transferred to a third party who provides the product for the employee's use, CAL. LAB. CODE § 3602(b)(3) (West 1971 & Supp. 1986) (civil suit permitted); where an employee can successfully allege a "serious and willful" violation of safety standards, CAL. LAB. CODE § 4553 (West 1971 & Supp. 1986) (workers' compensation award increased); and where an employer removes or fails to install power press operation guards, CAL. LAB. CODE § 4558 (West Supp. 1986) (civil suit permitted).

4. CAL. LAB. CODE § 3852 (West 1971 & Supp. 1986) provides that workers may pursue actions against third parties responsible for their injuries.

5. Where expressly provided by contract, these parties often cross-complain against the employee's own subcontractor-employer for indemnity. CAL. LAB. CODE § 3864 (West 1971) forbids an action for implied indemnity in the absence of a written agreement. *See, e.g.,* Hermann Christensen & Sons, Inc. v. Paris Plastering Co., 61 Cal. App. 3d 237, 132 Cal. Rptr. 86 (1976) (subcontractor which obligated itself to indemnify general contractor for "any and all claims, suits or liability for . . . injuries to persons" required to indemnify general contractor for damages paid to subcontractor's own employee for his work injuries).

6. RESTATEMENT (SECOND) OF TORTS § 343 (1965).

7. *Id.* § 411. *See, e.g.,* Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975) (employee injured by fall into unguarded equipment supplied by his employer permitted to sue job developer for negligent selection of contractor).

8. RESTATEMENT (SECOND) OF TORTS § 410 (1965). *See* Mackey v. Campbell Constr. Co., 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980); *see infra* notes 230-35 and accompanying text.

9. RESTATEMENT (SECOND) OF TORTS § 412 (1965).

10. *Id.* § 414. *See, e.g.,* Mackey v. Campbell Constr. Co., 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980); *see infra* notes 230-35 and accompanying text; Kramer v. Cedu Found., Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979); *see infra* notes 258-60.

liar risk" doctrine.¹¹ Courts originally developed this doctrine to protect third persons outside an owner's land who were injured by activities on the land.¹² The doctrine provides that landowners, as "employers"¹³ of contractors, have a nondelegable duty to ensure that safety precautions are taken where work is of a nature which foreseeably creates a "peculiar unreasonable risk of harm to others unless special precautions are taken."¹⁴ Even when a landowner contractually requires the general contractor to take necessary precautions, the landowner may still be held vicariously liable for the general contractor's failure to take those precautions.¹⁵ Similarly, a general contractor, as the employer of subcontractors, is subject to the nondelegable duty and vicarious liability of the peculiar risk doctrine.¹⁶

The peculiar risk doctrine provides a particularly broad basis for third party liability in California. Most jurisdictions in the United States have held that the rule does not pertain to employees because their inju-

11. The "peculiar risk" doctrine derives its name from the language of the *Restatement*: "work . . . likely to create . . . a *peculiar* unreasonable risk . . ." RESTATEMENT (SECOND) OF TORTS 413 (1965) (emphasis added). See also *id.* § 416 ("work . . . likely to create . . . a peculiar risk"). The California Supreme Court suggested that the doctrine would be better labeled "special risk," adopting language taken from the RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965): "'Peculiar' does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a *special, recognizable danger* arising out of the work itself.'" *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 509, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979) (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965)). See Booth, *Passive Third Party Liability*, 45 L.A. B. BULL. 372 (1970), for a discussion of the peculiar or "special risks" doctrine in California.

12. See *infra* notes 56-61 and accompanying text.

13. Landowners or general contractors who employ independent contractors will be referred to in this Comment as "owner-employers," although they are referred to in the *Restatement* as "employers." RESTATEMENT (SECOND) OF TORTS ch. 15 (1965). See *infra* note 14 for an example of the *Restatement's* grouping of landowners and general contractors into the single term, "employer."

14. RESTATEMENT (SECOND) OF TORTS § 413 (1965) states:

One who employs an independent contractor to do work which the *employer* should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Id. (emphasis added).

15. RESTATEMENT (SECOND) OF TORTS § 416 (1965), states that employers are liable for physical harm caused by "the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise."

16. See *supra* note 14.

ries are covered by workers' compensation laws.¹⁷ However, since 1962, California has taken the minority position that employees *are* covered by the peculiar risk doctrine.¹⁸ Employer-owners who hire independent contractors have been held liable to workers for the negligence of the workers' subcontractor-employers,¹⁹ and even for the negligence of the workers themselves under the concept of comparative negligence.²⁰

The California Supreme Court's interpretation of the peculiar risk doctrine has led to its application in many more situations than originally contemplated by the drafters of the *Restatement* doctrine.²¹ The doctrine has been applied to almost every common construction site activity, including backing-up large trucks,²² moving heavy objects,²³ working at heights,²⁴ working on bridges,²⁵ working from scaffolds,²⁶ working in trenches²⁷ and working pursuant to an unsafe plan.²⁸ Not surprisingly, some California lower courts have balked at this expansive interpretation, which imposes a nondelegable duty to ensure workers' safety for often ordinary construction risks that do not rise to the level of liability under the doctrines of inherent danger,²⁹ grave risk³⁰ or strict liability

17. A minority of jurisdictions have held that the peculiar risk doctrine is applicable to employees: District of Columbia (*Lindler v. District*, 164 U.S. App. D.C. 35, 38-40, 502 F.2d 495, 498-500 (1974)); Iowa (*Giarratano v. Weitz Co.*, 259 Iowa 1292, 1306-08, 147 N.W.2d 824, 833-34 (1967)); Missouri (*Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 112-18, 6 S.W.2d 617, 624-27 (1928)); South Dakota (*Hagberg v. City of Sioux Falls*, 281 F. Supp. 460, 466-68 (D.S.D. 1968)); Tennessee (*International Harvester Co. v. Sartain*, 32 Tenn. App. 425, 449-57, 222 S.W.2d 854, 865-68 (1948)).

18. In *Woolen v. Aerojet Gen. Corp.*, 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962), the California Supreme Court decided that the "others" referred to in § 413 of the RESTATEMENT (SECOND) OF TORTS (1965), see *supra* note 14 for text, included injured workers employed by the independent contractors. See *infra* notes 120-24 and accompanying text for a discussion of *Woolen*.

19. See, e.g., *LaCount v. Hensel Phelps Constr. Co.*, 79 Cal. App. 3d 754, 145 Cal. Rptr. 244 (1978) (subcontractor who employed plaintiff misjudged weight of concrete girders; excess weight caused girders to fall while being hoisted, striking plaintiff).

20. See *infra* notes 244-60 and accompanying text.

21. See *infra* notes 184-85 and accompanying text.

22. See *infra* notes 184-85 and accompanying text.

23. See *infra* notes 186-95 and accompanying text.

24. See *infra* notes 94-201 and accompanying text.

25. See *infra* note 198 and accompanying text.

26. See *infra* notes 202-21 and accompanying text.

27. See *infra* notes 222-28 and accompanying text.

28. See *infra* notes 229-37 and accompanying text.

29. See *infra* note 64 and accompanying text.

30. RESTATEMENT (SECOND) OF TORTS § 423 (1965) states:

One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the

activities.³¹ The result is that the peculiar risk doctrine has assumed importance far beyond its origins; the doctrine acts to exempt construction workers from workers' compensation limitations, while the workers' subcontractor-employers, and ultimately, those who engage the subcontractors, must nevertheless contribute to the workers' compensation system.

Whether an activity leading to a particular accident gives rise to the heightened duty under the peculiar risk doctrine is a question of fact.³² However, the question may be taken from the jury,³³ or the jury's verdict may be set aside,³⁴ if a particular court believes that the doctrine must be strictly construed when applied to a work-related injury,³⁵ or that a work situation is not a peculiar risk "as a matter of law."³⁶

Does the severity of the injuries construction workers often incur³⁷

contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

See, e.g., Ramsey v. Marutamaya Ogatsu Fireworks Co., 72 Cal. App. 3d 516, 140 Cal. Rptr. 247 (1977) (operators of fireworks display successfully sued sponsors for injuries sustained when shells exploded before leaving the ground).

31. RESTATEMENT (SECOND) OF TORTS §§ 427A, 519-24 (1965).

32. *See Mackey v. Campbell Constr. Co.*, 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980). "[W]hether the work is likely to create a peculiar risk . . . is ordinarily a question to be resolved by the trier of fact." *Id.* at 785, 162 Cal. Rptr. at 64. *See also* BAR APPROVED JURY INSTRUCTIONS 13.21, 13.21.4 (7th ed. 1986).

BAR APPROVED JURY INSTRUCTIONS 13.21.4 defines peculiar risk as follows:

The term ["peculiar risk"] ["special risk"] of bodily harm is a risk:

1. Which is peculiar to the work to be done,
2. Which arises out of the character of the work or the place where the work is to be done, and
3. Against which a reasonable person with the knowledge and experience of the defendant would recognize the necessity of taking special precautions.

The term ["peculiar risk"] ["special risk"] does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work to be done.

33. *See, e.g., Henderson Bros. Stores v. Smiley*, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981) (nonsuit reversed); *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977) (nonsuit upheld).

34. *See, e.g., Ferrel v. Safway Steel Scaffolds*, 57 Cal. 2d 651, 371 P.2d 311, 21 Cal. Rptr. 575 (1962) (judgment notwithstanding the verdict reversed); *Castro v. State*, 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (1981) (judgment notwithstanding the verdict reversed).

35. *See infra* notes 220-21 and accompanying text.

36. *See, e.g., Anderson v. Chancellor W. Oil Dev. Corp.*, 53 Cal. App. 3d 235, 243, 125 Cal. Rptr. 640, 645 (1975) ("[T]he use of a scaffold . . . does not constitute . . . [a] peculiar activity . . ."). *See infra* notes 207-08 and accompanying text.

37. In *Widman v. Rossmoor Sanitation, Inc.*, 19 Cal. App. 3d 734, 747, 97 Cal. Rptr. 52, 59 (1971), the court stated: "It is common knowledge that workmen injured or killed in construction work do not receive full compensation under the Workmen's Compensation Act for damages that they sustain, notwithstanding the commendable purpose of such legislation." *See generally, Philo, Revoke the Legal License to Kill Construction Workers*, 19 DE PAUL L. REV. 1 (1969).

justify a tort recovery, or does the peculiar risk avenue remain, as some courts have called it, a needless "windfall" circumventing the workers' compensation laws?³⁸

This Comment explores the policies which led to the peculiar risk exception, and to its expanded application in California to distribute risk among owner-employers, contractors and employees in a dangerous industry. This Comment also reviews the doctrine's applicability in particular work activities and describes how it is currently applied. Finally, this Comment proposes a method by which the peculiar risk doctrine can be applied consistently, both in terms of the workers' compensation scheme and within construction employment situations.

II. HISTORY AND POLICY

A. *Liability Under the Entrepreneur Theory v. Enterprise Theory*

The peculiar risk doctrine is best understood by examining the development of employers' common law vicarious liability for torts committed by their independent contractors.

The general rule that employers are not liable for the torts of their independent contractors³⁹ developed in England⁴⁰ and the United States⁴¹ in the nineteenth century. It represented a retreat from the earlier rule⁴² which held employers liable for nearly all of their servants' torts under *respondeat superior*.⁴³ Determination of whether the em-

38. *West v. Guy F. Atkinson Constr. Co.*, 251 Cal. App. 2d 296, 301, 59 Cal. Rptr. 286, 289 (1967). In *West*, the court asked, "[w]hy should the employee of the independent contractor recover benefits greater than the employee of the general contractor? True, case law has made him the beneficiary of a windfall and the owner-general contractor the insurer of payment of that windfall in the 'nondelegable liability' cases." *Id.* at 301, 59 Cal. Rptr. at 289-90.

39. RESTATEMENT (SECOND) OF TORTS § 409 (1965).

40. In *Bush v. Steinman*, 126 Eng. Rep. 978 (1799), the court held a homeowner liable for injuries to the plaintiff and his wife resulting when their carriage overturned due to lime in the road in front of the home. The defendant had contracted with a surveyor to repair his house. The surveyor in turn hired a bricklayer whose servant placed the lime in the road.

Later British decisions retreated to the position of employer nonliability. *See, e.g.*, *Laugher v. Pointer*, 108 Eng. Rep. 204 (1826) (employer not liable for negligence of hired driver; liability for injury resulting from hired property distinguished from liability for injury resulting from use of real estate).

41. Early cases held employers liable, following *Bush v. Steinman*, 126 Eng. Rep. 978 (1799). *See Lowell v. Boston & Lowell R.R.*, 40 Mass. (23 Pick.) 24 (1849); *Stone v. Cheshire R.R.*, 19 N.H. 427 (1839). Later decisions held employers not liable. *See, e.g.*, *Blake v. Ferris*, 5 N.Y. 48 (1851); *Hilliard v. Richardson*, 69 Mass. (3 Gray) 349 (1855), *cited in* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS*, § 71 n.4 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON*]; *Painter v. Mayor, Citizens & Alderman of Pittsburgh*, 46 Pa. 213 (1863).

42. *PROSSER & KEETON*, *supra* note 41, § 71.

43. This phrase, which literally means, "let the master answer," stands for "the proposi-

ployer or the contractor should be liable for torts committed during work depended on an analysis under the "entrepreneur theory."⁴⁴ The early view was that because an employer has no right to control the manner in which a contractor performs his work, the enterprise should be regarded as the contractor's, who is in a better position to prevent, administer and distribute the risk.⁴⁵ The majority rule that forbids suits by construction workers against the owner-employers of the workers' employer-contractors reflects this view.⁴⁶

The "enterprise theory" advocates imposing liability on the owner-employer because he is the party who will benefit primarily from the enterprise. An owner-employer who selects his contractor may insist on financial responsibility and demand indemnity and, as a cost of doing business, can procure insurance to distribute the risk.⁴⁷ The peculiar risk

tion that one is liable for the torts of his employees [sic] committed within the scope of their employment." Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 339 (1934). Morris stated that the *respondeat superior* doctrine may have been "conceived at a time when the relation of master and servant was one of such close personal surveillance that there were few cases in which masters were not in some way implicated in the wrongs of their servants." *Id.* at 340. Those conditions have changed but the rule remains, so that even an "exemplary employer may be held liable for a wrong . . . he has used every precaution to prevent." *Id.* According to Morris, other policies must be found to justify an employer's liability. He notes the following:

The employee [sic] . . . is usually judgment proof The employer . . . can and should consider this liability as a cost of his business. He may avoid this cost by staying out of business entirely, or he can plan to carry such losses by insuring against them and adjusting his prices so that his patrons must bear part, if not all, of the burden of insurance. In this way losses are spread and the shock of accident is dispersed.

Id. at 340-41.

44. The "entrepreneur theory" was analyzed in Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929). The test under this theory is concerned with four factors:

(1) Control: the ability to formulate and to execute policies, *i.e.*, to make decisions in respect to the production or marketing functions. (2) Ownership: the legal (or equitable) title to the property used in the performance of the production or marketing functions. (3) Losses: the investment which is staked on the success of the venture. (4) Profits: the chance to receive a monetary gain from the transaction.

Id. at 595-96. Using this analysis, a court can determine whether the owner-employer or contractor has more characteristics of an entrepreneur for purposes of imposing liability. *Id.* at 596.

45. Comment, *Liability of Landowners Resultant From Their Employment of Independent Contractors*, 13 HASTINGS L.J. 147, 147 (1961); *see also* Morris, *supra* note 43, at 343. Morris noted that the rationale for finding that it is unjust to hold one person liable for the torts of another he cannot direct overlooks the fact that the employer selects the contractor. *Id.* at 343-44.

46. *See supra* note 17 for a list of the few jurisdictions which do not follow the majority rule.

47. *See* PROSSER & KEETON, *supra* note 41, at § 71.

doctrine as applied in California reflects this reasoning.⁴⁸

B. Development of Exceptions

Although owner-employer nonliability for the torts of independent contractors remains the favored view, numerous exceptions have mitigated it. These exceptions to the nonliability rule led one court to observe that it is applied "only 'where no good reason is found for departing from it.'"⁴⁹

In the context of landowners, numerous exceptions to the general rule of nonliability developed. In addition to an owner-employer's liability for his own negligence,⁵⁰ he retains certain nondelegable duties "arising out of some relation toward the public or the particular plaintiff."⁵¹ For example, landowners have a duty to invitees, including workers, to protect them against dangerous conditions on the land.⁵² Similarly, owners are under a nondelegable duty to injured persons where they retain control and direction of work,⁵³ where work is performed under a public franchise⁵⁴ or where a statute forbids delegation.⁵⁵

C. The Peculiar Risk Exception

The peculiar risk doctrine developed to remedy the injustice that

48. See discussion of entrepreneur liability theory in the California Supreme Court's opinion in *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 285 P.2d 912 (1955); see *infra* notes 114-19.

49. *Walker v. Capistrano Saddle Club*, 12 Cal. App. 3d 894, 898, 90 Cal. Rptr. 912, 914 (1970) (quoting RESTATEMENT (SECOND) OF TORTS § 409). Prosser commented that the general rule covers only those exceptional cases which do not fit into one of the categories of exceptions. W. PROSSER, LAW OF TORTS § 71, n.94 (4th ed. 1971).

50. The RESTATEMENT (SECOND) OF TORTS, Topic 1, Introductory Note (1965) lists the following duties of an employer: to exercise reasonable care in giving orders for the work, *id.* § 410; to select a competent contractor, *id.* § 411; to inspect the work for safety, *id.* § 412; to provide for precautions required because of a special risk, *id.* § 413; to exercise reasonable care over work on which he retains control, *id.* § 414; and to supervise equipment and methods of persons doing work on his land, *id.* §§ 414A, 415.

51. RESTATEMENT (SECOND) OF TORTS § 409 comment b (1965).

52. *Id.* § 414A.

53. See *supra* note 10.

54. See, e.g., *Delgado v. W.C. Garcia & Assocs.*, 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963) (nondelegable duty to the public imposed on owners where they constructed sewers under contract with city).

55. RESTATEMENT (SECOND) OF TORTS § 424 (1965). See, e.g., *Golden v. Conway*, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976). Although under common law there is no liability of owner to tenant for defective premises, CAL. CIV. CODE § 1714a (West Supp. 1986) imposes statutory nondelegable duty of reasonable care in management of property. Although workers' compensation statutes impose duties on employers to provide for worker safety, these standards are not admissible in a third party action. See *infra* notes 148-52 and accompanying text.

occurred when persons injured outside an owner's land, as a result of work performed on the land, were unable to recover because of the landowner's immunity for torts committed by independent contractors. The usual situations involved an adjacent landowner whose house suffered damage because of excavation work⁵⁶ or a passerby who tripped over unguarded construction materials or fell into uncovered excavations in the street.⁵⁷

The case commonly recognized as the first expression of the peculiar risk exception is *Bower v. Peate*,⁵⁸ an 1876 English decision. In *Bower*, a landowner hired an independent contractor to erect a house, which necessitated some excavation work. The owner was held liable for injury to a neighbor's house. The court held that:

a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else⁵⁹

However, even earlier, the United States Supreme Court had held in *Chicago v. Robbins*⁶⁰ that a landowner would be liable for failure to require an independent contractor to provide lights and guards for work conducted on a public sidewalk.⁶¹

Although this concept was termed "peculiar risk" by the drafters of the *Restatement (First) of Torts*,⁶² most American courts have preferred the terms "intrinsic" or "inherent" danger.⁶³ While the distinction is not

56. See, e.g., *Bower & Peate*, 1 Q.B.D. 321 (1876); see *infra* notes 58-59 and accompanying text.

57. See *Chicago v. Robbins*, 67 U.S. 418 (1862); see *infra* notes 60-61 and accompanying text.

58. 1 Q.B.D. 321 (1876).

59. *Id.* at 326.

60. 67 U.S. 418 (1862).

61. *Id.* at 427. Work ordered by the defendant landowner included an excavation in an adjoining sidewalk. The plaintiff fell in the unguarded excavation. The Court held that where an owner

fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it . . . and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, . . . insists that he is not in fault, [i]f the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

Id.

62. RESTATEMENT (FIRST) OF TORTS § 416 (1934).

63. "Intrinsic" danger was first defined in 4 DILLON, MUNICIPAL CORPORATIONS § 1722

commented on in the first *Restatement of Torts*, according to the second *Restatement*, inherently dangerous work necessitates a number of precautions⁶⁴ while work involving a peculiar risk usually requires a single precaution.⁶⁵ For the most part, though, the concepts have been used interchangeably.⁶⁶ As defined by the drafters of the first *Restatement of Torts*, the peculiar risk rule encompassed few situations. The first *Restatement* listed only three illustrations of its application: demolition of buildings, tearing down walls and excavation work.⁶⁷ Thus, questions as to other possible applications remained to be addressed by American courts and by drafters of the second *Restatement*.

D. The Limits of Owner-Employer Liability Under the Peculiar Risk Doctrine in the Majority of Jurisdictions

As the first *Restatement* peculiar risk doctrine was applied by courts around the nation, a major question that arose was whether employees of

(5th ed. 1911). Judge Dillon stated, "where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed[,] . . . the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." *Id.* (emphasis in original).

64. RESTATEMENT (SECOND) OF TORTS § 427 (1965), states the rule of liability for work that an employer should recognize as entailing risks inherent in or normal to the work. It provides:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id. Examples of inherent risk activities are blasting and painting on a scaffold over a highway. RESTATEMENT (SECOND) OF TORTS § 416 comment a (1965).

65. RESTATEMENT (SECOND) OF TORTS § 416 comment a (1965) discusses this distinction:

There is a close relation between the rule stated in this Section, and that stated in § 427, as to dangers inherent in or normal to the work. The two rules represent different forms of statement of the same general rule, that the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters in to the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them. The rules stated in the two Sections have been applied more or less interchangeably in the same types of cases, and frequently have been stated in the same opinion as the same rule, or as different phases of the same rule. The rule stated in this Section is more commonly stated and applied where the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk. The rule stated in § 427 is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway.

66. RESTATEMENT (SECOND) OF TORTS § 416 comment a (1965), states that §§ 416 and 427 are so closely related that they are commonly regarded as "different phases of the same rule."

67. RESTATEMENT (FIRST) OF TORTS § 413 comment a (1934).

contractors would be permitted under the doctrine to sue the landowner who had hired those contractors or whether the doctrine was to be limited to passersby or other third parties. Although California was to answer this question in the affirmative, a majority position developed that prohibited this application of the doctrine.

1. Proposed limitation in the second *Restatement of Torts*

The *Restatement (Second) of Torts*, published in 1965, expanded the peculiar risk doctrine by broadening its definition⁶⁸ and providing additional categories of illustrations.⁶⁹

One very important proposed limitation to the second *Restatement* did not appear in the published version. A proposed "special note"⁷⁰ to the chapter on liability for the conduct of independent contractors stated that the rules were inapplicable to a defendant's own employees or to the employees of an independent contractor.⁷¹ The proponents of this special note reasoned that because premiums for workers' compensation insurance are included in the contract price paid by an owner, the owner has in effect borne the cost of workers' injuries.⁷² "[C]umbersome difficulties in drafting," however, prevented the authors from making this point clear within the text of the rules.⁷³ However, the drafters decided to eliminate the note from the final version due to differences in state workers' compensation laws.⁷⁴

2. Judicial limitation based on the second *Restatement of Torts*

Though not officially adopted, the introductory note has been quoted and relied on by the majority of courts that have rejected the applicability of the doctrine for contractors' employees. The same year

68. The requirement that the risk be foreseeable as "necessarily creating" a risk of harm was changed to read "likely to create" harm. The phrase "conditions containing an unreasonable risk of physical harm" was changed to "a peculiar unreasonable risk of physical harm." RESTATEMENT (SECOND) OF TORTS §§ 413, 416 (1965). See *supra* note 14 for text of § 413.

69. One modern example is seen in the second *Restatement*, § 416 comment d, which notes that an employer would be liable if injury resulted because a contractor employed to transport giant logs failed to anchor them on his truck. RESTATEMENT (SECOND) OF TORTS § 413 comment d, appendix (1966).

70. RESTATEMENT (SECOND) OF TORTS, ch. 15 special note (Tent. Draft No. 7, 1962).

71. *Id.*

72. *Id.* The drafters acknowledged that workers' compensation statutes frequently provide for third party liability, but stated, "it has not been thought necessary to impose such liability upon one who hires the contractor." *Id.*

73. *Id.* at ch. 15 special notes 17-18 (Tent. Draft No. 7, 1962).

74. 39 A.L.I. PROC. 246 (1962) (statement of William Prosser). Dean Prosser stated, "it appears undesirable, if not impossible, to state anything at all about what the liability is to employees of an independent contractor." *Id.*

the second *Restatement* was adopted, the Arizona Court of Appeal published an influential decision, *Welker v. Kennecott Copper Co.*,⁷⁵ that discussed the note, the *Restatement* text and other policy factors as support for its position that such workers were not covered by the rule. In *Welker*, the court observed that the introductory note to Chapter 15 of the *Restatement* referred to the owner's nondelegable duty to provide safe conditions in relation to "completed work,"⁷⁶ rather than "transitory conditions during construction"⁷⁷ Next, the court noted that none of the comments to the second *Restatement*'s various peculiar risk sections⁷⁸ refer to a duty to employees of independent contractors.⁷⁹ However, while it is true that these sections do not refer to employees of independent contractors, other sections in the chapter on owner-employer liability do cite examples of injured workers who are owed a duty.⁸⁰ The *Welker* court also distinguished the peculiar risk duties from the duty of using due diligence to exercise control the owner retains, as that duty is defined in section 414.⁸¹ In such a situation, the owner would be liable to workers because he chose not to delegate his duties to the contractors.⁸²

The Arizona court also emphasized that *Restatement* section 416 comment c states "[t]he liability imposed by the rule . . . is no greater

75. 1 Ariz. App. 395, 403 P.2d 330 (1965) (employee of subcontractor killed while digging a trench below bank of excavation that collapsed on him; trial court ruling permitting issue of owner-employer negligence in exercise of control over work as proximate cause of death reversed and remanded for new trial). The decision has been cited by courts in other states, including: Alaska (*State v. Morris*, 555 P.2d 1216, 1221 (Alaska 1976)); Kentucky (*King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 662 (Ky. 1973)); and New Jersey (*Donch v. Delta Inspection Serv., Inc.*, 166 N.J. Super. 558, 573, 398 A.2d 925, 928 (N.J. 1979)).

76. RESTATEMENT (SECOND) OF TORTS ch. 15 special note (Tent. Draft No. 7, 1962).

77. 1 Ariz. App. at 402, 403 P.2d at 337.

78. RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 423, 427 (1965).

79. 1 Ariz. App. at 402, 403 P.2d at 337.

80. RESTATEMENT (SECOND) OF TORTS §§ 409-429 (1965). While most of the illustrations of an owner-employer's liability to third persons given therein refer to passersby or adjoining landowners, the following illustrations concern construction workers.

Section 422 states that a landowner who retains control over his land while an independent contractor works on it is liable to injured third persons. Illustration 2 states that the landowner would not be liable where "[t]he premises are turned over to the contractor, who is in full possession and control of them. While the work is in progress B, a workman employed by a subcontractor, is injured by falling into an excavation which the contractor has negligently left unguarded." *Id.* § 422 illustration 2 (emphasis added).

Section 425 holds employers of independent contractors liable for negligently maintained equipment supplied to others. Under illustration 3, a general contractor would be liable for injuries to a worker of a subcontractor suffered on scaffolding negligently repaired by one of the general contractor's other subcontractors. *Id.* § 425 illustration 3.

81. *Id.* § 414.

82. *Walker*, 1 Ariz. App. at 405, 403 P.2d at 337.

than that to which the employer would be subject if he retained the taking of these precautions in his own hands"⁸³ The *Welker* court reasoned that if an owner had the work performed by his own employees, his liability would be limited to the payment of workers' compensation benefits.⁸⁴

Finally, the court concluded that the definition of a peculiar risk was "difficult to apply in the extreme"⁸⁵ because it includes work of a type likely to produce injuries unless precautions are taken.⁸⁶ The court reasoned that in the construction industry

[i]t is probably inconceivable . . . that work of this magnitude could be performed without some personal injury to the employees. . . . And every major construction job has its own peculiar dangers arising from special jobsite factors, or the combinations of work that must be performed.⁸⁷

The California Supreme Court rejected this argument as a basis for limiting application of the doctrine in its most recent peculiar risk case, *Griesel v. Dart Industries, Inc.*⁸⁸

Other policy considerations for rejecting the application of the doctrine for the benefit of workers were discussed by the Minnesota Supreme

83. RESTATEMENT (SECOND) OF TORTS § 416 comment c (1965).

84. 1 Ariz. App. at 404, 403 P.2d at 339. The court stated:

[A]s to the employees engaged in the work to be performed, the contractee is not "escaping" liability by contracting with an independent contractor. The contractee either directly or indirectly pays Workmen's Compensation premiums. No valid reason occurs to this court to penalize the legal-industrial tool of the contract with an independent contractor, so as to increase the liability of the builder simply because this device is used. The reason for the exception to the general rule being absent, the court does not believe that the exception should pertain.

Id.

In addition to comprising the subject of the *Restatement* special note, see *supra* note 70, courts in other states have relied heavily on the owner indirectly paying worker's compensation as a reason for rejecting application of the rule for contractors' employees. See, e.g., *Johns v. New York Blower Co.*, 442 N.E.2d 382, 388 (Ind. Ct. App. 1982); *King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 663 (Ky. 1973); *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 406 (Minn. 1981); *Donch v. Delta Inspection Servs. Inc.*, 165 N.J. Super. 567, 574, 398 A.2d 925, 929 (1979).

85. 1 Ariz. App. at 404, 403 P.2d at 339.

86. *Id.*

A substantial difference between the general rule . . . [of nonliability] and the exception now under consideration is that in the one case the work is of such character, that, if properly done, no injurious consequences can arise, and in the other the work is of a character from which damages are likely to arise unless precautionary measures are adopted.

Id. (quoting 57 C.J.S. *Master and Servant* § 590a (1948)).

87. 1 Ariz. App. at 404, 403 P.2d at 339.

88. 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979); see *infra* notes 226-28 and accompanying text.

Court in *Conover v. Northern States Power Co.*⁸⁹ That court found that the doctrine imposed "one . . . duty too many"⁹⁰ on owners because the contractors employing workers already have a nondelegable duty to provide a safe workplace. Moreover, the court stated that the job risks were created by the contractors, not by those employing them: "one who hires an independent contractor with employees specialized to do the hazardous work should not be penalized by being held vicariously liable for an injury to those employees."⁹¹ The court concluded that each party should be liable for its own conduct according to its separate duties of care.⁹² Because owners as land possessors have a personal duty to persons coming onto their premises, the court noted that the effect of denying workers recovery under the nondelegable peculiar risk duty is "more theoretical than real."⁹³ The Minnesota court rejected the argument that the nondelegable duty was necessary to keep jobsites safe, reasoning that this could be accomplished by holding owners liable for their own fault in negligently hiring a contractor or failing to take needed precautions.⁹⁴

E. Employer-Owner Liability Under California Law

1. Before the first *Restatement of Torts*

California law had not developed the peculiar or inherent risk exceptions prior to the 1934 publication of the first *Restatement of Torts*.⁹⁵

89. 313 N.W.2d 397 (Minn. 1981). In *Conover*, a power company hired an independent contractor to move power lines from old poles to new ones. Plaintiff lineman, employee of the contractor, fell when the old pole upon which he was working broke. The trial court's judgment notwithstanding the verdict for defendant was reversed in part and affirmed in part, with the court holding the evidence was sufficient to support a determination that the defendant breached a personal duty owed to plaintiff, but that defendant could not be held vicariously liable under the *Restatement* nondelegable duties, including peculiar risk, for injuries to its subcontractor's employee. *Id.* at 403.

90. *Id.* at 404.

91. *Id.* at 405 (discussing *Vagle v. Pickards Mather & Co.*, 611 F.2d 1212 (8th Cir. 1979)).

92. *Id.*

93. *Id.* at 406.

94. *Id.* The court reasoned that:

[I]t would seem the employer's exposure for his own personal fault to the contractor's employee is sufficient incentive for the employer to hire a competent contractor and to take needed precautions. Any nondelegable duty that might be additionally imposed could still be avoided where the employer has sufficient bargaining power to obtain an indemnity agreement from the contractor. In addition, interjecting a nondelegable duty into this basic relationship may create a disincentive for safety. The contractor, who is supposed to be on the jobsite supervising, may have less incentive to provide a safe workplace if the employer is indirectly paying his workers' compensation premiums and, in addition, the contractor has subrogation rights against the employer.

Id.

95. RESTATEMENT OF TORTS (1934). See COMM. OF THE STATE BAR OF CAL. IN

The landowner's insulation from liability for the negligence of independent contractors had been firmly established since the California Supreme Court's 1857 decision in *Boswell v. Laird*,⁹⁶ decided nineteen years before *Bower v. Peate*.⁹⁷ In *Boswell*, two miners who were *not* landowners engaged architects to build a dam. Before the dam was completed, water broke through and swept a store downstream.⁹⁸ The court held that because the relationship of the miners and architects was that of employer-independent contractor, not employer-employee, the contractors alone were liable for damages.⁹⁹ In so holding, the court adopted a line of English decisions that favored owner-employer nonliability unless the control of a master-servant relationship was present.¹⁰⁰ The court noted that the owner-employers would have been liable if the plan had been theirs,¹⁰¹ if the work itself had created a nuisance,¹⁰² or if they had accepted and begun use of the dam.¹⁰³

Subsequent California cases which did impose owner-employer liability were not based on the inherent risk rationale, rather on the concept of *sic utere tuo ut alienum non laedas*, referred to in the *Boswell* decision.¹⁰⁴ The phrase, which means that an owner must "use [his] own property in such a manner as not to injure . . . [others],"¹⁰⁵ was applied to impose liability where work created a nuisance,¹⁰⁶ where a "special relationship" between the defendant and adjacent landowners existed¹⁰⁷

CHARGE OF ANNOTATION, CAL. ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF TORTS §§ 413, 416 (1940).

96. 8 Cal. 469 (1857).

97. 1 Q.B.D. 321 (1876); *see supra* notes 58-59 and accompanying text.

98. 8 Cal. at 488.

99. *Id.* at 494-95.

100. *Id.* at 495-96 (citing *Reedie v. London & N.W. Ry. Co.*, 154 Eng. Rep. 1201 (1849); *Allen v. Haywood*, 115 Eng. Rep. 749 (1845); *Milligan v. Wedge*, 113 Eng. Rep. 993 (1840); *Quarman v. Burnett*, 151 Eng. Rep. 509 (1840); *Laugher v. Pointer*, 108 Eng. Rep. 204 (1826)).

101. *Id.* at 498.

102. *Id.* at 497. The owner-employer would be liable where "the injury results, not from the manner in which the dam [was] erected, but from the fact that it is erected at all." *Id.* For example, the owner-employer would be liable if erecting the dam had diverted water to flood a neighbor's land. *Id.*

103. *Id.* at 498.

104. *Id.* at 494.

105. BLACK'S LAW DICTIONARY 1238 (rev. 5th ed. 1979). *See* Comment, *Liability for the Torts of Independent Contractors in California*, 44 CALIF. L. REV. 762, 766 n.33 (1956).

106. *See supra* note 102.

107. Comment, *supra* note 105, at 767 (citations omitted). "In California it is the existence of a special relationship, and not inherent danger in the activity, which consistently appears as the basis for ignoring the general rule of employer nonliability." *Id.* *See infra* notes 220-21 and accompanying text for one court's position that a special relationship is a requirement for

or where the defendant held a public franchise to perform an activity.¹⁰⁸ For example, while other states used the inherent risk exception to impose liability for aerial pesticide spraying, California courts achieved the same result with the *sic utere* doctrine.¹⁰⁹ Thus, exceptions to the rule of landowner nonliability developed slowly in California, most likely because of the influence of *Boswell v. Laird*¹¹⁰ and the *sic utere* doctrine.

2. California adoption of the first *Restatement*

References to the first *Restatement* began to appear in California opinions soon after its publication, though the limited exceptions to landowner nonliability still were based on nuisance, adjacent landowner status and public franchise.¹¹¹ In *Courtell v. McEachen*,¹¹² the California Supreme Court indicated that the peculiar risk doctrine could be applied in determining landowner liability to children hurt while playing on a vacant lot.¹¹³

a. employees as "others" protected

In 1955, the California Supreme Court first applied the peculiar risk doctrine to create owner-employer liability. The plaintiffs in *Snyder v. Southern California Edison Co.*¹¹⁴ were linemen employed by an independent contractor of the defendant. They were injured when a power pole improperly installed by a subcontractor of Southern California Edison fell on them.¹¹⁵ Liability in the case was based on a duty under a public franchise. The court concluded that "the duty imposed upon [the utility company] by the [public utility] statute and commission could [not] be delegated to an independent contractor so as to insulate defendant from liability because of the failure of the contractor to perform the duties."¹¹⁶ The court quoted extensively from Harper's *Law of Torts*,¹¹⁷

imposition of liability on employers of independent contractors regardless of the existence of a peculiar risk.

108. Comment, *supra* note 105, at 769 (citations omitted).

109. *Id.* at 766; see cases cited *id.* at 766 nn.31-32 applying the inherent risk exception.

110. 8 Cal. 469 (1857); see *supra* notes 96-104 and accompanying text.

111. Comment, *supra* note 105, at 772. For a discussion of other bases of contractor liability, see generally Brooks, *Tort Liability of Owners and General Contractors for On-the-Job Injuries to Workmen*, 13 UCLA L. REV. 99 (1965).

112. 51 Cal. 2d 448, 334 P.2d 870 (1959).

113. *Id.* at 456-57, 334 P.2d at 874.

114. 44 Cal. 2d 793, 285 P.2d 912 (1955).

115. *Id.* at 795, 285 P.2d at 913.

116. *Id.* at 797, 285 P.2d at 914.

117. *Id.* at 799, 285 P.2d at 915 (citing F. HARPER, *LAW OF TORTS* § 292 (1933)). Harper named two categories of cases involving imposition of liability on entrepreneurs: "nondelegable" duty by reason of a relationship with others, such as was found in *Snyder*, and intrinsi-

declaring a policy of entrepreneurial responsibility for torts resulting in injuries to employees of contractors. However, in another case published the same day,¹¹⁸ the court made it clear that the general rule of nonliability would not be abrogated: "[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract . . . without changing the . . . duties arising from that relationship."¹¹⁹ Nevertheless, the *Snyder* decision foreshadowed the court's broadening of owner duties through application of the peculiar risk doctrine for the benefit of injured workers employed by independent contractors.

In 1962, the California Supreme Court decided *Woolen v. Aerojet General Corp.*,¹²⁰ involving a worker asphyxiated while applying a flammable coating inside a tank with inadequate ventilation.¹²¹ In reversing a judgment for the plaintiffs, the court held that the jury instructions given failed to consider the elements required for liability under the peculiar risk doctrine.¹²² The court stated that the definitions of "others" in the *Restatement* included the employees of independent contractors, and cited previous decisions which also included employees in the phrase "others" protected under alternative sections of the *Restatement*.¹²³ Moreover, the court cited decisions of other jurisdictions which extended

cally dangerous work which is either extra-hazardous unless special precautions are taken or is inherently dangerous in any event. The latter category generally expresses the principle of the peculiar risk doctrine, though Harper limits its application to extreme hazards.

118. *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 285 P.2d 902 (1955); see *infra* notes 175-77 and accompanying text.

119. *McDonald*, 44 Cal. 2d at 790, 285 P.2d at 904; see *infra* note 177 and accompanying text.

120. 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962).

121. *Id.* at 408-09, 369 P.2d at 709-10, 20 Cal. Rptr. at 13-14. Although the product contained labels warning that fresh air must be continuously provided during application to prevent an explosive concentration of vapors, the contract contained no provisions for such precautions. Moreover, the independent contractor supplied no safety equipment to his employees. Only a week prior to the explosion, Aerojet had furnished all equipment and material to another painting contractor for application of the product, but had also provided explosion-proof lights and a blower to eliminate fumes. *Id.* at 408-09, 369 P.2d at 710, 20 Cal. Rptr. at 14.

122. *Id.* at 411-12, 369 P.2d at 711-12, 20 Cal. Rptr. at 15-16. The instructions also failed to take into consideration whether, apart from RESTATEMENT OF TORTS § 413 (1934), defendant had such control over the premises and work as to give rise to an independent duty to inspect. *Id.* at 411-12, 369 P.2d at 711-12, 20 Cal. Rptr. at 15-16.

123. *Woolen*, 57 Cal. 2d at 410-11, 369 P.2d at 711, 20 Cal. Rptr. at 15 (disapproving contrary dicta in *Bedford v. Bechtel Corp.*, 172 Cal. App. 2d 401, 414, 342 P.2d 495, 503 (1959)). The court had already defined employees as "others" within the meaning of §§ 414 and 428 of the first *Restatement* in *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 232-34, 282 P.2d 69, 73-74 (1955) and in *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 798, 285 P.2d 912 (1955); see *supra* notes 114-17 and accompanying text.

the peculiar risk duty to employees of independent contractors.¹²⁴

In another 1962 supreme court case, *Ferrel v. Safway Steel Scaffolds*,¹²⁵ a worker fell thirty feet from an inadequate scaffold while using an unsafe work method to repair a storage tank.¹²⁶ The court reversed a judgment for the defendant tank owner and held that, upon retrial,¹²⁷ the trier of fact should consider whether the owner-employer knew that the plan used to accomplish the job was unsafe and whether the employee was contributorily negligent.¹²⁸

The proposed introductory note to the *Restatement (Second) of Torts* did not prompt California to modify its application of the peculiar risk rule in favor of employees. Shortly after publication of the second

124. *Woolen*, 57 Cal. 2d at 411, 369 P.2d at 711, 20 Cal. Rptr. at 15 (citing *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617, 623-27 (1928); *International Harvester Co. v. Sartin*, 32 Tenn. App. 425, 222 S.W.2d 854, 865-68 (1948); *Annot.*, 23 A.L.R. FED. 1084, 1129-35 (1923)).

125. 57 Cal. 2d 651, 371 P.2d 311, 21 Cal. Rptr. 575 (1962).

126. *Id.* at 652-54, 371 P.2d at 312-13, 21 Cal. Rptr. at 576-77. Plaintiff's employer was an independent contractor engaged to repair a 40-foot storage tank damaged by fire and explosion. The contractor removed the top of the tank and placed a tower-like scaffold on wheels inside. The scaffold contained supports at various levels, across which the workers placed planks. The workers stood on these planks while they labored. To straighten the buckles and creases in the tank, a pipe with an attached hydraulic jack was suspended from a crane boom that moved the pipe to the level of repairs. The workers used a five-foot steel bar to manipulate the jack to expand the length of the pipe and force the buckle outward. The plaintiff stood on a platform, which was 30 inches wide and consisting of three planks, at the 23-foot level while he forced the buckled metal outward with the jack and steel bar. When he retracted the jack, the buckle sprang inward and the steel bar struck him, knocking him to the ground. *Id.* at 653-54, 371 P.2d at 313, 21 Cal. Rptr. at 577.

The court noted that more planks could have been placed at the level where the plaintiff worked and that there were no side railings. A mechanical engineer testified for plaintiff that the work method was "unusually dangerous" because of the danger of collapse due to the unstable condition of the damaged metal, and to the danger of "spring back" in the buckles coupled with the flimsy scaffold. The engineer testified that the usual method would have been to repair from outside the tank, with the sides braced against collapse and scaffolds welded to the sides. *Id.* at 654-55, 371 P.2d at 313-14, 21 Cal. Rptr. at 577-78.

127. The court had no difficulty in finding that the unsafe work method employed was "necessarily dangerous . . . in the absence of precautions." *Id.* at 656, 371 P.2d at 314, 21 Cal. Rptr. at 578. However, it affirmed an order for new trial on the issue of whether the tank owner reasonably could have been expected to know of the danger, and whether plaintiff was aware of the danger. *Id.*

128. The tank owner asserted that plaintiff must have been fully aware of the danger, and thus defended on the basis of contributory negligence. Under CAL. LAB. CODE § 2801 (West 1971), where an employee seeks to recover against an employer in a negligence action, the fact that such employee has been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

For a discussion of cases in which the defense of contributory negligence has been raised, see *infra* notes 224-31.

Restatement, the supreme court decided *Van Arsdale v. Hollinger*,¹²⁹ applying the peculiar risk rule in favor of an injured worker in a work situation which was not nearly as extreme as that in *Woolen* or *Ferrel*. In *Van Arsdale*, the plaintiff, who worked for an independent contractor, was hit by a car while he was eradicating street lines near a major Los Angeles intersection. At the time of the accident, the contractor had not provided flagmen as required by its contract with the City of Los Angeles. The plaintiff wore dark clothing, without a bright jacket. The contractor had also instructed the plaintiff to work beyond the safety cones warning of the work. A City inspector was on duty to ensure that work was being performed to specifications.¹³⁰

The jury found the plaintiff's employer, and not the City or the plaintiff himself, negligent.¹³¹ The supreme court reversed the judgment for the defendant City on the basis of its nondelegable duty of due care.¹³²

The supreme court's opinions in *Snyder*, *Woolen*, *Ferrel* and *Van Arsdale* represented a dramatic shift from general owner-employer nonliability to an "entrepreneur" liability policy protecting the employees of contractors under the peculiar risk doctrine. Though few other states have followed the California Supreme Court's reasoning,¹³³ contemporary California decisions have continued to expand the peculiar risk doctrine from its limited origins.

III. WORK SITUATIONS WHICH INVOLVE PECULIAR RISK

Under the second *Restatement* and the cases interpreting it, peculiar risks are "special, recognizable danger[s] arising out of" the work itself.¹³⁴ The *Restatement* clarifies that "peculiar" does not mean that the

129. 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

130. *Id.* at 248, 437 P.2d at 510, 66 Cal. Rptr. at 22.

131. *Id.* at 248-49, 437 P.2d at 510, 66 Cal. Rptr. at 22.

132. *Id.* at 256-57, 437 P.2d at 515-16, 66 Cal. Rptr. at 27-28. The court cited the California Law Revision Committee's comments that public entities may be liable for the acts of their independent contractors. Stating that "[i]t is clear that the liability of an employer of an independent contractor for the latter's tortious conduct is broad . . .," *id.* at 253, 437 P.2d at 513, 66 Cal. Rptr. at 25, the court quoted language of *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 285 P.2d 912 (1955). See *supra* notes 114-17. The court again listed considerations which have led courts to depart from the rule of nonliability of a private employer for the torts of an independent contractor. 68 Cal. 2d at 250-52, 437 P.2d at 511-13, 66 Cal. Rptr. at 23-25.

Although the court could have based the City's liability on the rule of nondelegable duty of public entities, it concluded as a matter of law that the conditions under which the plaintiff worked constituted a situation of nondelegable duty of due care. *Id.* at 254, 437 P.2d at 514, 66 Cal. Rptr. at 26 (citing RESTATEMENT (SECOND) OF TORTS § 416 illustrations 1 & 3).

133. See *supra* note 17.

134. See *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 510, 595 P.2d 619, 623, 156

risk is "abnormal" to the work, or "abnormally great," but rather that the risk is uniquely identifiable in advance as part of a given activity.¹³⁵ As the California Supreme Court stated in *Griesel v. Dart Industries Inc.*,¹³⁶ even the fact that an activity involves a danger that is ordinary to particular work does not preclude a finding of a "peculiar risk."¹³⁷

Construction work is particularly filled with routine dangers. Whether these dangers rise to the level of peculiar risks is a question of fact in each case.¹³⁸ The circumstances of each case must be analyzed to determine whether the construction activity entailed a risk of injury recognizable in advance, whether precautions were provided, whether such precautions were reasonable and, finally, whether the injury actually resulted from the peculiar risk or from some negligence collateral to the risk.

A. Knowledge and Foreseeability Prerequisites

Before the peculiar risk doctrine may be applied, it must be shown that the activity involves a risk that is recognizable in advance and which arises from the character or place of the work.¹³⁹ Considerations in determining whether a risk is recognizable include both the relative sophistication of the employer and the foreseeability of the particular harm requiring prevention through precautions.

1. Sophistication of employer

Section 413, comment f, of the *Restatement* makes it clear that a widow unfamiliar with construction or contracting who orders repairs on her house is held to a lower standard of knowledge than an industrial employer.¹⁴⁰ The *Restatement* does not give other examples of how the relative sophistication of an employer may affect his liability. Not surprisingly, California courts usually hold that construction employers meet the knowledge requirement.¹⁴¹ One court stated, "[u]nlike the ordinary person, . . . [the defendant developer's] officials and employees were

Cal. Rptr. 41, 45 (1979) (citing RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965)); see *infra* notes 193-95 and accompanying text.

135. RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

136. 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979).

137. *Id.* at 587, 591 P.2d at 508, 153 Cal. Rptr. at 218.

138. See, e.g., *Mackey v. Campbell Constr. Co.*, 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980). "[W]hether the work is likely to create a peculiar risk . . . is ordinarily a question to be resolved by the trier of fact." *Id.* at 785, 162 Cal. Rptr. at 69.

139. RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

140. *Id.* § 413 comment f.

141. See, e.g., *Widman v. Rossmoor Sanitation Inc.*, 19 Cal. App. 3d 739, 747, 97 Cal. Rptr. 52, 59 (1971). The defendant, a subsidiary of a large developer, argued that "the classification

knowledgeable in all phases of construction work and recognized, or should have recognized, that . . . [the work] was likely to create a peculiar risk."¹⁴² In *Aceves v. Regal Pale Brewing Co.*,¹⁴³ where several breweries contracted for demolition work, the California Supreme Court observed that although the breweries did not have

as much knowledge and experience regarding the dangers of demolition work as builders or demolishers, it [was] not unreasonable to expect them as business entities to have recognized that the work to be done would require the taking of special precautions to prevent harm to both the workers and the public.¹⁴⁴

2. Foreseeability of danger

a. custom and practice

For the same reasons that it is reasonable to assume that construction employers have a general knowledge of the dangers entailed in the projects they undertake, it is also fair to assume that they should foresee the specific risks involved in their work.

To establish the extent of an employer's or contractor's knowledge, plaintiffs introduce evidence of the custom and practice regarding safety in the construction industry. Work on construction sites is subject to California Industrial Safety Orders.¹⁴⁵ Although direct evidence of construction safety orders is inadmissible in civil third party actions,¹⁴⁶ experts generally testify that the custom and practice in the industry is to follow safety orders. In fact, courts have rejected arguments that following custom and practice excuses violation of those safety orders.¹⁴⁷

Formerly, an evidentiary presumption of negligence for violation of statutory standards sometimes assisted plaintiffs in establishing their case. Under California Evidence Code section 669,¹⁴⁸ a rebuttable pre-

of deep excavation work as an ultra-hazardous activity would expose to liability every poor widow" who has a swimming pool built. *Id.* at 746, 97 Cal. Rptr. at 59.

142. *Id.* at 747, 97 Cal. Rptr. at 59.

143. 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

144. *Id.* at 510, 595 P.2d at 621, 156 Cal. Rptr. at 45. See *infra* notes 193-95 and accompanying text.

145. CAL. ADMIN. CODE tit. 8, ch. 4(4).

146. CAL. LAB. CODE § 6304.5 (West Supp. 1986). For text, see *infra* note 156.

147. See, e.g., *Anderson v. L.C. Smith Constr. Co.*, 276 Cal. App. 2d 436, 81 Cal. Rptr. 73 (1969), where the court stated: "a usage in violation of the law can never grow into a valid custom." *Id.* at 444, 81 Cal. Rptr. at 78 (quoting 49 CAL. JUR. 2D *Usages and Customs* § 19 (1959)).

148. CAL. EVID. CODE § 669(a) (West Supp. 1986) provides in pertinent part:

sumption¹⁴⁹ of failure to exercise due care arises where a defendant violates a statute intended to protect the person whose injuries proximately result from the violation.¹⁵⁰ Until 1972, a very broad definition of "employer"¹⁵¹ theoretically subjected virtually all construction defendants with any supervisory control to a presumption of negligence if safety order violations were shown.

Despite this broad definition, the California Supreme Court held that owners and general contractors with only general supervisory powers were not to be regarded as "employers," and thus were not required to comply with safety orders.¹⁵² One effect of imposing such a standard would have been to make employer-owners insurers of every piece of equipment used by independent contractors. When the *Woolen v. Aerojet General Corp.*¹⁵³ court announced the application of the peculiar risk doctrine for the benefit of workers, it stated that the California Labor Code safety standards were not the proper measure of an owner's liability.¹⁵⁴ However, in certain instances, a plaintiff could introduce evidence that subcontractors and general contractors had violated safety orders on

The failure of a person to exercise due care is presumed if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

149. CAL. EVID. CODE § 669(b) (West Supp. 1986) provides in pertinent part:

This presumption may be rebutted by proof that:

- (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law

150. See *infra* note 155 for discussion of a case where a court held that workers were in the class of persons which the safety orders intended to protect.

151. Former CAL. LAB. CODE § 6304 (West 1971) provided in part: "'Employer' . . . shall . . . include every person having direction, management, control, or custody of any employment, place of employment, or any employee."

152. *Kuntz v. Del E. Webb Constr. Co.*, 57 Cal. 2d 100, 106, 368 P.2d 127, 131, 18 Cal. Rptr. 527, 531 (1961).

153. 57 Cal. 2d 407, 367 P.2d 708, 20 Cal. Rptr. 12 (1962); see *supra* notes 120-24 and accompanying text.

154. *Id.* at 412-13, 369 P.2d at 712, 20 Cal. Rptr. at 16.

The court also held that the lower court erred in giving instructions relating to Aerojet's duties as an "employer," holding that § 413 of the *Restatement*, not the Labor Code, was the proper measure of defendant's responsibility. *Id.* at 412-13, 369 P.2d at 712, 20 Cal. Rptr. at 16. Although the court acknowledged that an employer-employee relationship in the usual sense is not essential for application of the Labor Code, it concluded that "an owner of premises who does nothing more with respect to the work of an independent contractor than exercise general supervision and control to bring about its satisfactory completion is not an employer within the meaning of the safety provisions of the Labor Code." *Id.*

a job. For example, where a truck backed into a state worker and killed him, the plaintiffs were permitted to introduce evidence of safety orders for warning devices on backing trucks in their suit against a general paving contractor, its subcontractor and a third contractor who furnished the defective truck.¹⁵⁵

In 1972, the California State Legislature enacted a law which limited the admissibility of safety orders to actions against employers.¹⁵⁶ Although the statutory presumption is no longer available, plaintiffs continue to introduce testimony of expert witnesses, often former state safety inspectors, that the custom and practice in the industry is to follow the safety order standards.¹⁵⁷ Thus, despite the inadmissibility of state safety orders, owner-employers and contractors are effectively held to a standard requiring them to know and follow those orders.

b. risk causing accident must be foreseen

Even where injury occurs in a peculiar risk situation, if it does not result from the particular risk which the employer had a duty to foresee, no liability will be found.

i. ordinary and customary dangers

The risk that an independent contractor will perform work negli-

155. *Anderson v. L.C. Smith Constr. Co.*, 276 Cal. App. 2d 436, 440, 81 Cal. Rptr. 73, 76 (1969). The backing truck lacked the audible warning device required by CAL. IND. SAFETY ORDERS tit. 8, § 1576(e) (codified as amended at CAL. ADMIN. CODE tit. 8, R 1592 (1980)). *Id.* at 440, 81 Cal. Rptr. at 75. The paving contractor on the job subcontracted with a trucking company for six trucks and drivers. That subcontractor arranged for another company to provide one of the trucks, and that truck had no warning device. The court of appeal held the safety order was admissible against all three defendants. *Id.* at 440, 81 Cal. Rptr. at 76.

The defendants argued that the decedent, who was not employed by them, was not within the class of persons protected by that safety order. *See supra* note 145. The court concluded that "the purpose of Safety Order 1576(e) was to protect all persons rightfully in the construction area." *Anderson*, 276 Cal. App. 2d at 443, 81 Cal. Rptr. at 78.

156. CAL. LAB. CODE § 6304.5 (West Supp. 1986) was added. It provides:

It is the intent of the Legislature that the provisions of this division shall only be applicable to proceedings against employers brought pursuant to the provisions of . . . [the Labor Code] for the exclusive purpose of maintaining and enforcing employee safety.

Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer.

The operative date of the statute was April 1, 1972.

157. *See, e.g., Mackey v. Campbell Constr. Co.*, 101 Cal. App. 3d 774, 789-90, 162 Cal. Rptr. 64, 71-72 (1980) (standard to which expert testified was "custom and practice" of industry regarding scaffolds was identical to California Occupational Safety and Health Administration standard).

gently is present on any job. An owner-employer is not liable for every negligent act of his independent contractor. Under the *Restatement*, an employer is not required to take "routine precautions . . . which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work."¹⁵⁸ Thus, an owner-employer is not liable if the contractor drives at excessive speeds or with defective brakes.¹⁵⁹ However, if the project is transporting giant logs, an owner-employer would be liable if a contractor failed to take special precautions to anchor the logs because such an activity requires special precautions apart from those common to ordinary experience.¹⁶⁰

The fact that work on construction sites routinely requires many precautions led one trial court to instruct a jury that "'ordinary and customary danger[s] of construction work'" were not peculiar risks.¹⁶¹ However, the California Supreme Court has rejected this approach, holding that it is immaterial that certain dangers are ordinary and customary to a particular activity, as is the case in construction. Rather, the test is whether the owner-employer should have recognized the danger in advance.¹⁶²

ii. collateral negligence

Where injuries result from negligence not connected with the special precautions required by the peculiar risk doctrine, this negligence is termed "collateral" to the risk. *Restatement* section 426¹⁶³ excepts collateral negligence of contractors from the negligence for which owner-employers may be held liable. Collateral negligence occurs when:

158. *RESTATEMENT (SECOND) OF TORTS* § 413 comment b (1965).

159. *Id.*

160. *Id.* § 416 comment d.

161. *Griesel v. Dart Indus.*, 23 Cal. 3d 578, 587, 591 P.2d 503, 508, 153 Cal. Rptr. 213, 218 (1979).

162. *Id.* at 586-87, 591 P.2d at 508, 153 Cal. Rptr. at 217-18. See *RESTATEMENT (SECOND) OF TORTS* § 416 comment e (1965): "It is not essential that the peculiar risk be one which will necessarily and inevitably arise It is sufficient that it is a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work"

In reversing the lower court judgment for the defendant employer, the supreme court in *Griesel* stated that the jury should have been instructed that "a [trench] cave-in would be a peculiar risk of the work if the jury found that Dart should have recognized that anyone might enter the trench before it was properly shored or sloped." 23 Cal. 3d at 587, 591 P.2d at 508, 153 Cal. Rptr. at 218. This reasoning is similar to that in *RESTATEMENT (SECOND) OF TORTS* § 413 comment c (1965), where employers are held liable for injuries to passersby if contractors fail to light excavation work at night.

163. *RESTATEMENT (SECOND) OF TORTS* § 426 (1965).

(a) the contractor's negligence consists solely in the improper manner in which he does the work, and

(b) it creates a risk of such harm which is not inherent in or normal to the work, and

(c) the employer had no reason to contemplate the contractor's negligence when the contract was made.¹⁶⁴

Such negligence has also been described as negligence in the "operative detail" of the work, as distinguished from negligence in the plan followed.¹⁶⁵

If the plan or method itself entails dangers, the owner-employer remains liable.¹⁶⁶ For instance, an owner-employer would be liable if a worker painting a sign over a public sidewalk dropped a bucket of paint on a pedestrian.¹⁶⁷ If the painter was engaged to work within a building, and dropped his paint bucket out the window, the negligence would be collateral because the injury resulted from a risk not inherent in the plan of the job to be performed.¹⁶⁸

In *Salinero v. Pon*,¹⁶⁹ apartment building owners engaged a contractor to clean windows. There were no safety hooks on the roof,¹⁷⁰ so the owner-employer and contractor agreed on a plan to suspend boatswain's chairs weighted down by sandbags from the buildings. One window washer mistakenly removed the sandbags weighing down the chair in which his co-worker sat, causing him to fall approximately forty feet. The court held that the fellow worker's negligence could not be reasonably foreseen, was outside the scope of dangers "intimately associated" with window washing and was therefore collateral.¹⁷¹ The danger of fall-

164. *Id.*

165. *Id.* § 426 comment a.

166. *Id.* § 416 comment e. See *infra* notes 229-37 and accompanying text for discussion of work method as a peculiar risk.

167. RESTATEMENT (SECOND) OF TORTS § 426 illustration 3 (1965).

168. *Id.* § 426 illustration 4. In *Smith v. Lucky Stores, Inc.*, 61 Cal. App. 3d 826, 132 Cal. Rptr. 628 (1976), a gust of wind blew part of a sign over on a pedestrian. Workers were changing the store's name by lowering the letters with cables to the ground. The pedestrian was injured by a letter that had reached the ground, but was negligently released from the grip of a worker. The court of appeal found this was a "textbook" example of collateral negligence. *Id.* at 829-30, 132 Cal. Rptr. at 630. It noted that the employer would have been liable if the plaintiff had been injured while the sign was being lowered. *Id.* at 829, 132 Cal. Rptr. at 630.

169. 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981).

170. *Id.* at 126, 177 Cal. Rptr. at 206. A cause of action against the architect for failure to design the five and six story building with safety devices for window washing failed because it was brought outside the four-year statute of limitations. *Id.* at 129, 177 Cal. Rptr. at 208. See CAL. CIV. PROC. CODE § 337.1 (West 1982).

171. *Salinero*, 124 Cal. App. 3d at 137, 177 Cal. Rptr. at 213. Though not discussed in the case, the apartment owners' relative lack of sophistication may have been a factor in the

ing from a great height was contemplated by the owner-employer, and precautions were devised. Therefore, the defendants were found to have met their nondelegable duty.¹⁷²

iii. work involving contractor equipment

Owner-employers usually are held not liable where injuries are caused by equipment supplied by an independent contractor, even though such injuries are a "recognizable danger."¹⁷³ The rationale for this exception stems from the lack of control over the means of accomplishing work which defines the relationship between the owner-employer and independent contractor.¹⁷⁴ To require an owner-employer to insure the safety of every piece of his contractor's equipment would eviscerate the rule of nonliability for the acts of independent contractors. However, where the *work plan* itself presents a peculiar risk, using defective equipment to accomplish that plan can evidence a failure to take the special precautions necessary to prevent the harm.

In the 1955 case of *McDonald v. Shell Oil Co.*,¹⁷⁵ the California Supreme Court held that an owner-employer was not liable for injuries to an employee of a contractor that resulted from the fall of extremely heavy steel elevators that were being removed from an oil well. The accident occurred due to the absence of a safety clamp in a contractor-supplied rig.¹⁷⁶ The court based its holding on the fact that the owner of the

court's decision. See *infra* note 203 for a discussion of *Jacob Doll & Sons v. Ribetti*, 203 F. 593 (3d Cir. 1913), where lessees were held liable under similar facts.

172. *Salinero*, 124 Cal. App. 3d at 139, 177 Cal. Rptr. at 214.

173. See, e.g., *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 156 Cal. Rptr. 701 (1979). The plaintiff, a carpenter, had wired open the blade guard on a circular saw. He was injured when he fell from a sawhorse while using the saw. The court found that negligent use of hand tools involved ordinary negligence—"a usual, common and anticipatable danger in the routine performance of the work, against which the owner is not required to take special precautions." *Id.* at 972, 156 Cal. Rptr. at 706.

174. See *supra* note 45.

175. 44 Cal. 2d 785, 285 P.2d 902 (1955). This case was announced the same day as *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 285 P.2d 912 (1955); see *supra* notes 114-19.

In *McDonald*, the plaintiff was the employee of an independent contractor engaged by defendant Shell Oil to recover casing and to abandon an oil well. He was injured by the fall of steel elevators weighing 1200 pounds when the rope of a well-pulling rig snapped due to the absence of a safety clamp. The plaintiff contended that Shell exercised control over the operations of the independent contractor and knew, or should have known, of the unsafe conditions on the job site. *Id.* at 789, 285 P.2d at 904.

176. *Id.* at 787-88, 285 P.2d at 903. Shell defended on the basis that it did not actively interfere with or direct the independent contractor in his operations, that it had no duty to provide safe equipment for the use of plaintiff and that the sole cause of the injuries was the negligence of the independent contractor and its employees. *Id.* at 788, 285 P.2d at 903. The court agreed that the lesser degree of control exercised by Shell over the job shielded Shell from liability for plaintiff's injuries. *Id.* at 792, 205 P.2d at 905. The court distinguished

drilling rig had neither exercised control over the acts of the subcontractor, nor supplied the allegedly defective materials.¹⁷⁷

Other courts have cited *McDonald* for the proposition that work involving contractor-supplied equipment may not be classified as a peculiar risk.¹⁷⁸ However, the fact that work involves the use of a contractor's equipment does not preclude a finding of a peculiar risk. The inquiry in each instance must be whether an *activity* itself involves recognizable dangers in its accomplishment and whether or not those dangers entail the use of contractor equipment. Under this analysis, for example, courts have ruled that work near moving vehicles¹⁷⁹ and cranes¹⁸⁰ may involve peculiar risks.

B. Particular Construction Activities

1. Work near moving vehicles

An owner-employer is not liable for accidents resulting from the negligent use of vehicles over which he has no control. In *Holman v. State*,¹⁸¹ a heavy equipment operator fell into the unshielded, high-speed revolving drive-shaft of an earthmover. The court concluded that the "injuries were caused solely by a defect in . . . equipment unrelated to any risk inherent in grading and surfacing the highway"¹⁸² If the plaintiff had been required to drive under dangerous conditions when the injury occurred, the court noted that the defendant would have been liable under the peculiar risk doctrine for failing to provide seatbelts or a rollbar.¹⁸³

In *Castro v. State*,¹⁸⁴ the court found that the defendant should have anticipated a dangerous situation involving moving vehicles and concluded that the precautions taken were inadequate. The plaintiff, a dump

factual situations in which an owner-employer may be liable for injuries to the employee of the independent contractor: the employee was not injured by a condition of the owner's premises over which the owner-employer remained in control and where the owner-employer owed duties to the employee as a business invitee; the owner-employer did not furnish the equipment; and it did not actively interfere with or arbitrarily assume to direct the employees of the independent contractor as to the manner and method of performing the work. Further, the work on its property did not constitute a nuisance. *Id.* at 789-90, 285 P.2d at 905.

177. *Id.* at 787-88, 285 P.2d at 903.

178. *See, e.g., Anderson v. Chancellor W. Oil Dev. Corp.*, 53 Cal. App. 3d 235, 125 Cal. Rptr. 640 (1975); *see infra* notes 240-42 and accompanying text.

179. *See infra* notes 181-85 and accompanying text.

180. *See infra* notes 187-92 and accompanying text.

181. 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975).

182. *Id.* at 331, 124 Cal. Rptr. at 781.

183. *Id.*

184. 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (1981).

truck driver, was working under the hood of his vehicle while he waited in line to haul excavated dirt. Each truck was required to back a distance of more than half a block to its place in line. The plaintiff was injured when one of the trucks struck him while backing up. It was alleged that the noise of other heavy equipment prevented the truck's backup warning bells from being heard. The court held that this evidence supported the jury's finding of peculiar risk, requiring special precautions such as flagmen, which had not been provided.¹⁸⁵

2. Work involving weight or force

Another category of peculiar risk cases is activities involving objects of great weight or potential force. The *Restatement* drafters illustrated this category of work involving peculiar risk by contrasting a contractor's driving at excessive speed with the failure to anchor "giant logs."¹⁸⁶ The damage to be anticipated from the force and weight of a spill of giant logs makes their transportation a peculiar risk.

In *LaCount v. Hensel Phelps Construction Co.*,¹⁸⁷ a worker was struck by two concrete girders weighing about sixteen tons. The worker's employer was a subcontractor hired to fabricate and install a load of hundred-ton concrete girders for a rapid transit subway station. The accident, which occurred in the subcontractor's yard, resulted because the subcontractor's foreman misjudged the weight of the two girders. The foreman directed that the girders be lifted on trolley hoists,¹⁸⁸ which, in violation of safety orders, were not marked with weight limits.¹⁸⁹ The court affirmed a judgment for the plaintiff, rejecting arguments by the general contractor that the peculiar risk doctrine was inapplicable as a matter of law because it resulted from "collateral" or "casual" negligence of the subcontractor.¹⁹⁰ The court stated that load-

185. *Id.* at 512-13, 170 Cal. Rptr. at 739. See also *Anderson v. L.C. Smith Constr. Co.*, 276 Cal. App. 2d 436, 81 Cal. Rptr. 73 (1969); see *supra* note 155.

186. RESTATEMENT (SECOND) OF TORTS § 416 comment d (1965).

187. 79 Cal. App. 3d 754, 145 Cal. Rptr. 244 (1978).

188. *Id.* at 761-62, 145 Cal. Rptr. at 247. "A trolley suspension hoist means a hoist whose upper suspension member is a trolley for the purpose of running the hoist below a suitable runway." *Id.* at 762, 145 Cal. Rptr. at 254 (citing CAL. ADMIN. CODE tit. 8, § 3913(g) (1984)).

189. *Id.* at 761, 145 Cal. Rptr. at 247. The safety orders provide in part: "The maximum rated capacity of all cranes shall be plainly marked on each side of the crane . . ." CAL. ADMIN. CODE tit. 8, § 3941(a) (1984). The excess weight on the trolleys caused the girders to drop, knocking the plaintiff into the water. *LaCount*, 79 Cal. App. 3d 754, 761, 145 Cal. Rptr. 244, 247.

190. *Id.* at 769, 145 Cal. Rptr. at 252. See *supra* notes 163-72 and accompanying text for a discussion of "collateral negligence." The court distinguished two cases, *Anderson v. Chancellor W. Oil Dev. Corp.*, 53 Cal. App. 3d 235, 125 Cal. Rptr. 640 (1975), see *infra* notes 216-

ing the huge girders was "intimately connected with the work authorized."¹⁹¹ The court also upheld a jury instruction describing the defendant's statutory duty of care noting that, by statute, the duty was nondelegable.¹⁹²

In *Aceves v. Regal Pale Brewing Co.*,¹⁹³ the California Supreme Court found that demolishing a brewery using a bulldozer to push a 500 pound steel panel presented a "special and recognizable danger" and thus held the owner-employer liable when the panel fell on the subcontractor's employee.¹⁹⁴ The plaintiff's employer took no precautions to ensure that workers would not be in the vicinity of the demolition work.¹⁹⁵

3. Work involving height or depth

Work performed at heights and around equipment at heights always involves a risk that workers will fall unless special precautions are taken. Injuries resulting from falls from heights have been held compensable under the peculiar risk doctrine in the following situations: a worker was

21, and *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977), see *infra* notes 253-57. The *LaCount* court stated: "Although *Anderson* and *Elder* stand for the proposition that the concept of peculiar risk is strictly interpreted when an employee of the independent contractor is the injured party, these cases do not stand for the proposition that every time an employee is injured the peculiar risk doctrine is inapplicable." 79 Cal. App. 3d at 769, 145 Cal. Rptr. at 252.

191. 79 Cal. App. 3d at 766, 145 Cal. Rptr. at 251 (quoting *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 801, 285 P.2d 912, 916 (1955)).

192. *Id.* at 772-73, 145 Cal. Rptr. at 251-55. The general contractor argued that it could not be held liable for safety order violations because it was not a statutory employer. The court found that it had a nondelegable duty under the contract terms. *Id.* The general contractor also contended that the plaintiff's employer was not a "subcontractor" under the contract definition because the work was conducted off the rapid transit subway site. Because the subcontractor was to install the girders on the rapid transit work site, the court held it was a subcontractor for purposes of the contract. *Id.* at 771-72, 145 Cal. Rptr. at 254.

The argument that the plaintiff's employer was not a subcontractor because the work was not conducted on the defendant's premises also failed in *White v. Uniroyal, Inc.*, 131 Cal. App. 3d 1, 202 Cal. Rptr. 141 (1984). There, the court of appeal held that it was error not to give a jury instruction on peculiar risk when, during the manufacture at a chemical plant of a compound ordered by the defendant, three employees were injured and one killed. *Id.* at 31, 202 Cal. Rptr. at 159.

193. 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

194. *Id.* at 507, 595 P.2d at 621, 156 Cal. Rptr. at 43.

195. *Id.* at 508, 595 P.2d at 621, 156 Cal. Rptr. at 43. No precautions were provided for in the contract for the demolition work. In fact, the plaintiff was assisting his foreman in pushing on the panel, neither realizing that the bulldozer was involved in the same effort outside the building. *Id.* at 507-08, 595 P.2d at 621, 156 Cal. Rptr. at 43. The court stated: "Certainly the risk that someone may be hurt if precautions are not taken to assure that no one is standing behind a wall that is being knocked over is a 'special, recognizable danger arising out of' demolition work." *Id.* at 510, 595 P.2d at 623, 156 Cal. Rptr. at 45.

knocked off a ten-foot wall, which had no railings, by a concrete buggy;¹⁹⁶ a worker fell onto a steel floor from a thirty-foot steel column, where no scaffolding, safety nets, lines or ladders were provided;¹⁹⁷ and a cement finisher fell from a thirty-foot wet cement bridge which had no rails or scaffolds.¹⁹⁸ Conversely, collateral negligence was held to be the cause of the forty-foot fall of a window washer in *Salinero v. Pon*.¹⁹⁹ Collateral negligence was also found when two men working on a platform fell after one worker sawed through the supports before a skip-loader was in place to support the platform.²⁰⁰ In the latter two cases, courts held that injuries occurred because of the workers' negligence, rather than from a failure to properly provide a safe work method.²⁰¹

a. scaffolds

The *Restatement* cites scaffold accidents as an example of inherent danger in the "ordinary or prescribed way of doing" work.²⁰² The recognizable risk in using a scaffold to paint a wall above a sidewalk is that the scaffold, paint brush or bucket, or the painter himself, may fall and injure someone passing below.²⁰³ Under *Woolen v. Aerojet General Corp.*,²⁰⁴ a worker injured in a fall from a scaffold is also protected by the inherent danger rule.²⁰⁵ Moreover, one of the earliest California Supreme Court cases to discuss peculiar risk with reference to workers involved a fall from a scaffold.²⁰⁶

Certain California courts have relied on the 1952 appellate decision in *Hard v. Hollywood Turf Club*²⁰⁷ in holding that work with scaffolds is

196. *Morehouse v. Taubman Co.*, 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1970).

197. *Stilson v. Moulton-Niguel Water Dist.*, 21 Cal. App. 3d 928, 98 Cal. Rptr. 914 (1971).

198. *Fonseca v. County of Orange*, 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972).

199. 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); *see supra* notes 169-72 and accompanying text.

200. *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977); *see infra* notes 253-57 and accompanying text.

201. *See supra* notes 163-72 and accompanying text for a discussion of collateral negligence.

202. RESTATEMENT (SECOND) OF TORTS § 427 comment c (1965).

203. *Id.* This particular comment contemplates injury to persons other than falling workers. It is based on the facts of *Jacob Doll & Sons v. Ribetti*, 203 F. 593, 596 (3d Cir. 1913). In *Jacob Doll*, a pedestrian was injured when a window washer lost his balance and fell from a fourth story window sill. The defendant lessee was held liable since he knew that the building was not equipped with hooks for safety belts and failed to provide for safety precautions in the contract. *Id.* at 594-95.

204. *Woolen v. Aerojet General Corp.*, 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962); *see supra* notes 120-24 and accompanying text.

205. *Id.* at 410-11, 369 P.2d at 711, 20 Cal. Rptr. at 15; *see supra* note 123.

206. *Ferrel v. Safway Steel Scaffolds*, 57 Cal. 2d 651, 371 P.2d 311, 21 Cal. Rptr. 575 (1962); *see supra* notes 125-28 and accompanying text.

207. 112 Cal. App. 2d 263, 246 P.2d 716 (1952).

not a peculiar risk.²⁰⁸ In *Hard*, a painter fell forty feet to the ground when a defective scaffolding erected by his subcontractor-employer collapsed. Relying on the importance of the workers' compensation statute,²⁰⁹ the court rejected the plaintiff's arguments that the defendant general contractor retained control over the job site²¹⁰ or that the general contractor was a "statutory employer."²¹¹ Finally, the court declared, "[t]here is nothing inherently dangerous in doing work on a high scaffold."²¹² The court cited as authority the 1915 supreme court decision in *Schmidlin v. Alta Planing Co.*,²¹³ which held that there was nothing inherently dangerous in raising an otherwise empty scaffold that contained a bucket of paint.²¹⁴ In that case, the unsecured bucket fell and struck a worker as painters standing on a roof lifted the scaffolding. However, the court's decision in *Schmidlin* is distinguishable from *Hard*, because the falling bucket in the *Schmidlin* case resulted from collateral negligence, not from a failure to take precautions in the plan of work itself.²¹⁵

Despite the tenuous nature of this authority, courts critical of the peculiar risk doctrine have cited *Hard* as support for the position that "scaffolds" are not a peculiar risk. In *Anderson v. Chancellor Western Oil Development Corp.*,²¹⁶ an oil worker was struck by a 150 to 200 pound "stabbing board."²¹⁷ Oil drilling crew members positioned the stabbing boards at various heights on oil derricks for use as scaffolds. The board that struck the plaintiff was dislodged by a catline used to move part of the drilling floor. The court found that there was no peculiar risk in the use of the stabbing board, citing *Hard*.²¹⁸ The court found that the combined use of the stabbing board and catline caused the plain-

208. See, e.g., *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977); *Anderson v. Chancellor W. Oil Dev. Corp.*, 53 Cal. App. 3d 235, 125 Cal. Rptr. 641 (1975). In *Mackey v. Campbell Constr. Co.*, 101 Cal. App. 3d 774, 785, 162 Cal. Rptr. 64, 69 (1980), the court of appeal stated that this attempted characterization is incorrect in that the determination is factual, not legal. See *supra* note 32.

209. See *supra* note 1.

210. 112 Cal. App. 2d 263, 273-74, 246 P.2d 716, 723 (1952).

211. *Id.* at 268-72, 246 P.2d at 720-22.

212. *Id.* at 275, 246 P.2d at 724.

213. 170 Cal. 589, 150 P. 983 (1915).

214. *Id.* at 592, 150 P. at 984.

215. See RESTATEMENT (SECOND) OF TORTS § 426 (1965); see *supra* notes 163-72 for a discussion of collateral negligence.

216. 53 Cal. App. 3d 235, 125 Cal. Rptr. 640 (1975).

217. *Id.* at 238, 125 Cal. Rptr. at 642. "Stabbing boards" are described as planks approximately 20 feet long, 12 inches wide and 3 inches thick, reinforced with iron edges and weighing 150 to 200 pounds. *Id.* at 238, 125 Cal. Rptr. at 641.

218. *Id.* at 243, 125 Cal. Rptr. at 645 (citing *Hard*, 112 Cal. App. 2d at 275, 246 P.2d at 724).

tiff's injuries.²¹⁹ It held that, for policy reasons, the doctrine must be strictly construed.²²⁰ On an oil well site, peculiar risks would be "explosion, fire or disturbance of ground support where specific precautions are required."²²¹

b. work in trenches

Work in trenches illustrates a peculiar risk of harm without the collateral negligence issue of contractor-supplied equipment. Also, there is usually the additional duty of care imposed on the landowner for activities on his land.²²² Thus, liability has been found much more readily than in the scaffold cases.

Injuries resulting from trench cave-ins are severe.²²³ Shoring, sloping or other means are required to make trenches safe places to work.²²⁴ California courts have held that trench work entails a peculiar risk requiring these special precautions.²²⁵ In *Griesel v. Dart Industries, Inc.*,²²⁶ a worker entered a nine-foot trench to check the grade, not realizing that he could do so from outside the trench. The California Supreme Court held that the work constituted a peculiar risk,²²⁷ even though it noted that ordinarily no one would have entered the trench until a later stage in

219. 53 Cal. App. 3d at 243, 125 Cal. Rptr. at 645.

220. *Id.* See *supra* note 38 and accompanying text for a discussion of the policy reasons behind workers' compensation.

221. 53 Cal. App. 3d at 243, 125 Cal. Rptr. at 645.

222. RESTATEMENT (SECOND) OF TORTS § 422 (1965).

223. Evidence offered in *Widman v. Rossmoor Sanitation, Inc.*, 19 Cal. App. 3d 734, 97 Cal. Rptr. 52 (1971) reflected that, according to a 1964-65 study by the California Division of Industrial Safety, 1 out of every 13 workers receiving a disabling injury in a cave-in dies, and 14 times as many workers die from cave-ins of ditches, trenches and other excavation work than in any other construction accidents. *Id.* at 746, 97 Cal. Rptr. at 59.

224. CAL. ADMIN. CODE tit. 8, R. 1541(d) (1982).

225. See *Griesel v. Dart Industries, Inc.*, 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979), see *infra* notes 226-28 and accompanying text; *Widman v. Rossmoor Sanitation, Inc.*, 19 Cal. App. 3d 734, 97 Cal. Rptr. 52 (1971); *Delgado v. W.C. Garcia & Assocs.*, 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963).

In *Delgado*, the defendants contracted with the City of San Jose to build a sewer for a subdivision they owned. The court found that the contract with the City made the defendants' duties nondelegable. Other possible bases of liability cited by the court were peculiar risk and the nondelegable duty of landowners to invitees. 212 Cal. App. 2d at 9-10, 27 Cal. Rptr. at 616-17.

In *Widman*, a rain-soaked trench collapsed under the weight of a backhoe, burying two workers. The court found considerable danger to the workers in the absence of shoring. 19 Cal. App. 3d at 746, 97 Cal. Rptr. at 59. The court also found substantial evidence that the defendants exercised control over the job. *Id.* at 748, 97 Cal. Rptr. at 60.

226. 23 Cal. 3d 582, 591 P.2d 503, 153 Cal. Rptr. 213 (1979).

227. *Id.* at 587, 591 P.2d at 508, 153 Cal. Rptr. at 218.

the work, at which time it would have been shored.²²⁸

4. Negligent work plan

The *Restatement* states that an owner-employer is liable for directing that work be conducted in a negligent manner.²²⁹ The result of imposing peculiar risk liability is to enlarge the scope of duty of an owner-employer who actively participates in planning a job.

In *Mackey v. Campbell Construction Co.*,²³⁰ unsafe movement of an unwieldy scaffold was found to be a peculiar risk. The owner-employer purposely retained a high degree of control over its management contractor, Campbell Construction.²³¹ Representatives of the owner-employer and Campbell met with the subcontractor and agreed on a plan to move a huge scaffold.²³² The plan called for moving it into place fully assembled. While being moved down a grade, the scaffold fell over, injuring the plaintiff. The court held that the work method chosen was itself a peculiar risk which required special precautions, such as removal of the top sections.²³³

The *Restatement* defines a peculiar risk as one which an owner-employer should recognize as "likely to arise in . . . the particular method which the owner-employer knows that the contractor will adopt."²³⁴ In *Mackey*, the defendant's participation in approving a method to move the scaffold subjected it to an nondelegable duty. The peculiar risk ordinarily would arise only in the project itself—erection of aluminum siding at a height of forty feet. If the method for moving the scaffold into place had not been known and approved by the defendant, the injuries to the plaintiff would have been found the result of negligence collateral to the peculiar risk.²³⁵

228. *Id.* at 582, 591 P.2d at 505, 153 Cal. Rptr. at 215.

229. RESTATEMENT (SECOND) OF TORTS § 410 (1965).

230. 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980).

231. *Id.* at 779-80, 162 Cal. Rptr. at 65. The defendant owner-employer hired Campbell Construction to act as a management, rather than a general, contractor to construct a warehouse. This arrangement was made so that the owner-employer could work through its own personnel with Campbell to select subcontractors and participate directly in the project. *Id.*

232. *Id.* at 780, 162 Cal. Rptr. at 66. Sections of the scaffold were assembled so that it measured over 30 feet high, 20 feet long and 5 feet wide with a 6 foot wheel base. *Id.* at 781, 162 Cal. Rptr. at 66.

233. *Id.* at 785-87, 162 Cal. Rptr. at 69-70 (citing *Gettemy v. Star House Movers*, 225 Cal. App. 2d 636, 37 Cal. Rptr. 441 (1964)). In *Gettemy*, a worker was killed when a nine-ton tree fell on him when it was unsafely cut down. The court held that the method chosen to fell the tree in a residential district failed to employ proper precautions. 225 Cal. App. 2d at 644, 37 Cal. Rptr. at 446.

234. RESTATEMENT (SECOND) OF TORTS § 416 comment e (1965).

235. *Id.*

An owner-employer will not ordinarily retain the degree of control shown in *Mackey*. Where the owner-employer delegates responsibility to a general contractor for planning a work method, the owner-employer cannot be found liable for defects in the work plan. However, the general contractor may be held liable for devising a plan that constitutes a peculiar risk. In *Caudel v. East Bay Municipal Utility District*,²³⁶ a worker slipped off the muddy push arm of his bulldozer while working at night. The contractor provided lights for part of the project, but not for the area to which the plaintiff was directed. The court held that whether the work involved a peculiar risk in the absence of special precautions, i.e., failure of the general contractor to provide adequate lighting for work in the muddy area, was a factual question. The defendant general contractor unsuccessfully argued that the plaintiff's injuries resulted from negligence in the operative detail of the work—in the negligent orders of the subcontractor to the plaintiff to move his bulldozer to an unlighted area and to dismount.²³⁷

IV. LIMITATIONS TO THE PECULIAR RISK DOCTRINE

A. Workers' Compensation

Even though *Woolen v. Aerojet General Corp.*²³⁸ and other California Supreme Court opinions have not held that the workers' compensation system is a bar to third party recovery, some lower courts have attempted to narrow the application of the peculiar risk rule, characterizing tort recovery by employees of subcontractors as a "windfall."²³⁹ Perhaps the strongest statement limiting the applicability of the doctrine appeared in *Anderson v. Chancellor Western Oil Development Corp.*²⁴⁰ In the *Anderson* court's view, the peculiar risk doctrine must be strictly interpreted "where the strong public and legal policy favors exclusivity of the workmen's compensation remedy."²⁴¹ The court noted that nondelegable duties have been found in "inherently dangerous" activities "generally in connection with some primary basis of liability."²⁴² While several

236. 165 Cal. App. 3d 1, 211 Cal. Rptr. 222 (1985).

237. *Id.* at 7, 211 Cal. Rptr. at 225-26.

238. 57 Cal. 2d 407, 367 P.2d 708, 20 Cal. Rptr. 12 (1962); *see supra* notes 120-24 & 203-05 and accompanying text.

239. *See supra* note 37.

240. 53 Cal. App. 3d 235, 125 Cal. Rptr. 640 (1975).

241. *Id.* at 243, 125 Cal. Rptr. at 645.

242. *Id.* at 239-40, 125 Cal. Rptr. at 642-43. In *Anderson*, the plaintiff was struck by a platform dislodged by a catline while he was working on an oil drilling floor. In addition to finding that there was no peculiar risk because there was no "primary basis of liability," *id.* at 239, 125 Cal. Rptr. at 642, the court noted that the injury resulted from defective equipment

bases for imposing a nondelegable duty may be present in a given situation, the peculiar risk doctrine does not require this. Subsequent decisions by the court of appeal indicate a continuing split in accepting the supreme court's policy permitting third party tort recovery.²⁴³

B. *Effect of Evolution to Comparative Negligence*

1. Former law: contributory negligence and assumption of risk

Before the 1975 decision in *Li v. Yellow Cab Co.*,²⁴⁴ which introduced comparative negligence in California, workers could be barred from recovery because of contributory negligence. However, in *Fonseca v. County of Orange*,²⁴⁵ the court of appeal limited the applicability of contributory negligence as a defense "in deference to . . . enlightened policy factors underlying safety orders."²⁴⁶ In *Fonseca*, an experienced cement finisher worked on a wet cement bridge despite knowing that required railings and scaffoldings were absent.²⁴⁷

In tort cases, another bar to recovery is the assumption of risk doctrine, under which plaintiffs may not recover if they voluntarily incurred a known peril.²⁴⁸ However, assumption of risk is not a defense to suits against owner-employers because "public policy insists that the plaintiff's acquiescence or knowledge should not insulate the defendant from liability for his violation."²⁴⁹ Whether a worker's conduct entailed contributory negligence or assumption of the risk was normally an issue for

supplied by the independent contractor. *Id.* at 241, 125 Cal. Rptr. at 643 (citing *McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 285 P.2d 902 (1955)). See *supra* notes 173-80 and accompanying text for a discussion of defective equipment as an exception to the peculiar risk rule.

243. See, e.g., *Castro v. State*, 114 Cal. App. 3d 503, 170 Cal. Rptr. 734 (1981), where the court of appeal stated:

[A]s a matter of public policy, we see no justification for a strict interpretation of the peculiar risk doctrine just because the injured person is the employee of the independent contractor rather than a third person. The workers' compensation law preserves an employee's right to obtain redress for injuries caused by the negligence of third persons who are not in an employment relationship with him. . . . The Supreme Court has never suggested that the doctrine must be strictly interpreted when the injured party is an employee of the independent contractor.

Id. at 514, 170 Cal. Rptr. at 740-41 (citation omitted).

244. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

245. 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972).

246. *Id.* at 370, 104 Cal. Rptr. at 572.

247. Railings were required by safety orders under CAL. ADMIN. CODE tit. 8, art. 16, R.R. 1321, 1620 (1979). See *supra* notes 145-57 and accompanying text for a discussion of the custom and practice of the construction industry as it relates to employer-owners foreseeability of inherent risks.

248. *Fonseca*, 28 Cal. App. 3d at 368-69, 104 Cal. Rptr. at 571.

249. *Id.* at 368, 104 Cal. Rptr. at 570 (quoting *Mason v. Case*, 220 Cal. App. 2d 170, 177, 33 Cal. Rptr. 710, 714 (1963)). Contributory negligence remained an available defense in both *Fonseca* and *Mason*. *Id.* at 367, 104 Cal. Rptr. at 570.

the trier of fact. However, the court of appeal in *Fonseca* held that "the policy of the safety statutes and safety orders is to protect workmen whose unequal economic power prevents them from protecting themselves. This policy would be negated by a finding that behavior such as that of plaintiff . . . was unreasonable."²⁵⁰

2. Modern law: comparative negligence

Under the *Fonseca* reasoning, a worker could recover fully for his injuries, even where his negligence contributed to their occurrence. Under comparative negligence, a worker's tort award should be reduced by his proportionate negligence,²⁵¹ but not for the negligence of the subcontractor-employer.²⁵² However, in *Elder v. Pacific Telephone & Telegraph Co.*,²⁵³ where the plaintiff's actions "bordered on the foolhardy,"²⁵⁴ he and a co-plaintiff were denied recovery completely.

In *Elder*, construction of a building addition required removal of a fire escape. A plan was devised to cut away the supporting rebar, using a skip-loader under the platform during the last stage. Before the skip-loader was in place, the plaintiff cut through the last rebar, sending the platform, the plaintiff and a co-worker to the ground.²⁵⁵ The court held that the plaintiff could not recover since he had not established a prima facie case of negligence by the defendant owner-employer nor proved proximate causation.²⁵⁶ The court's holding prevented the plaintiff from presenting to the jury the issue of how much negligence was directly attributable to the worker. The court held that where the negligence proximately causing injury is intimately connected with the special precautions the owner-employer must undertake, the defendant is not

250. *Id.* at 369-70, 104 Cal. Rptr. at 571.

251. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1242-43, 119 Cal. Rptr. 858, 874-75 (1975).

252. Under *Witt v. Jackson*, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961), a subcontractor-employer's workers' compensation lien is disallowed if he was contributorily negligent. Following the supreme court's decision in *Li*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), however, the supreme court held in *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978), that principles of comparative negligence would be applied to reduce workers' compensation liens by the percentage of fault attributed to the worker's employer. *See, e.g.*, *Kramer v. Cedu Fdn.*, 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979) (comparative negligence principles applied against an employee and his employer); *see infra* text accompanying notes 258-59.

253. 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977).

254. *Id.* at 660, 136 Cal. Rptr. at 207.

255. *Id.* at 656, 136 Cal. Rptr. at 205. Plaintiff Elder erroneously thought the channel iron surrounding the platform would support the workers. The injured co-worker was also a plaintiff.

256. *Id.* at 657, 136 Cal. Rptr. at 206.

liable.²⁵⁷

In *Kramer v. Cedu Foundation, Inc.*,²⁵⁸ an intoxicated worker fell from a twelve-foot scaffold while unsupervised on a Saturday morning, and won an award based on negligent supervision.²⁵⁹ The jury apportioned the negligence that caused the accident among the worker, his immediate employer, the project supervisor and the owner-employer for negligent supervision.²⁶⁰

V. PROPOSED APPROACH TO PECULIAR RISK PROBLEMS

Peculiar risk work involves neither ordinary negligence, for which no owner-employer liability will be imposed, nor strict liability, where liability without fault may be found. After an accident occurs, courts inquire into whether it resulted from mere ordinary negligence or from a peculiar risk situation.

A peculiar risk situation may exist even if the work is not highly dangerous, and in fact is ordinary to construction. Although this makes the factual determination more difficult, construction activities can be classified according to the qualities that make them a peculiar risk.

The first issue is whether injury resulted from ordinary negligence in the details of performing work. This category of negligence cannot fairly be imputed to the owner-employer of an independent contractor. Accidents involving hand tools will normally fall into this category.

Next, it must be decided whether the owner-employer should have recognized in advance that, because of the nature of a particular activity, injury might result unless safety measures were provided. This involves a preliminary determination of whether a particular owner-employer has the sophistication to realize the dangers in the work ordered. However, commercial owner-employers of independent contractors virtually always will meet this requirement. California cases which have held activities to require special precautions can be classified as those which involve

257. *Id.* at 659, 136 Cal. Rptr. at 207. The court commented: "[T]he risk which was in fact realized was not one inherent in the nature of the specific demolition project. Rather, the injuries which befell plaintiffs . . . were essentially the result of Elder's own negligence in 'sawing off the limb' upon which they both were standing." *Id.*

258. 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

259. *Id.* at 12, 155 Cal. Rptr. at 558.

260. *Id.* at 6, 155 Cal. Rptr. at 554. Cedu Foundation contracted for the construction of a private residence. The general contractor shared supervisory responsibility with two Cedu Foundation employees. The jury assessed 38% negligence to Cedu and 24% negligence to the general contractor, with 19% negligence assessed against both the employee and his immediate supervisor. *Id.*

the risk that workers will be injured by great weight or force, particularly where they must work at heights, depths or near moving equipment.

The adequacy of safety precautions must next be decided. Precautions can be as simple as preventing workers from venturing near dangerous work. Generally, the California Industrial Safety Orders with which owner-employers must comply represent a fair standard by which to measure whether proper precautions have been arranged. The safety orders themselves are properly inadmissible as evidence, since otherwise every aspect of construction site activity covered by safety orders could be alleged to be "peculiar risk." However, where an activity otherwise meets the peculiar risk description, the substance of the safety orders—customs and practice—fairly presents the standard to which owner-employers should be held.

The harshness of the nondelegable duty and vicarious liability is mitigated by the availability to owner-employers of indemnity from their independent contractors, as well as comparative negligence against the workers. As a condition to the contract, owner-employers normally include indemnity requirements. If at trial the owner-employer shows that the worker's subcontractor-employer negligently failed to take precautions, or that the employee himself was negligent, the owner-employer's damages will be reduced. Thus, a jury award against an owner-employer may be apportioned between the general contractor, subcontractor and the employee, with the owner-employer liable for only a small amount. While this may seem a circuitous route, placing tort liability back on the employee's own subcontractor-employer, it is one that requires each party, including the worker, to consider job safety and the precautions required to prevent injuries.

VI. CONCLUSION

The peculiar risk doctrine represents a limited exception to owner-employer nonliability and exclusivity of workers' compensation recovery for injured workers. The doctrine permits a fair distribution of risk in those circumstances that warrant its application, without circumventing the principles of owner-employer nonliability or workers' compensation. Landowners who contract for development of construction projects necessarily recognize that the risks involved exceed the risks of nearly all other industries. Under the enterprise theory, it has long been advocated that those who order work from which they will benefit should bear the risks attendant to it. The judicial decisions in California with respect to assumption of risk, contributory negligence and comparative negligence

demonstrate a policy to place a lesser burden on an injured worker than on the party who initiates the work resulting in the injury.

California's workers' compensation statutes also recognize that in prescribed situations, recovery beyond the normal limits of the system is equitable, as where a "serious and willful" disregard of the employee's safety is shown.

Properly applied, the peculiar risk doctrine operates with the workers' compensation and owner-employer nonliability principles to achieve equitable distribution of risk in a dangerous industry.

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